

1 HONORABLE RONALD B. LEIGHTON
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 JAMES KYLE PECK,

11 Plaintiff,

12 v.

13 JON TUNHEIM,

Defendant.

CASE NO. C16-5580RBL

ORDER OF DISMISSAL

14 THIS MATTER is before the Court on Plaintiff Peck’s “Motion and Declaration for
15 Notice” [Dkt. # 11]. Peck is *pro se*, his prior efforts to obtain *in forma pauperis* status were
16 denied [Dkt. #s 2 & 5]. Peck was ordered to pay the filing fee or file an amended complaint. He
17 has since sought and obtained two extensions of time for doing so. His second effort, Dkt. # 8,
18 included both a prosed amended complaint and a motion seeking additional time to locate and
19 provide evidence to the court. The motion was granted and the “evidence” was supplied [Dkt.
20 #9].

21 Peck’s current motion argues that he “has not received a ruling” on his second amended
22 complaint [Dkt. #11].

1 A district court may permit indigent litigants to proceed *in forma pauperis* upon
 2 completion of a proper affidavit of indigency. *See* 28 U.S.C. § 1915(a). The Court has broad
 3 discretion in resolving the application, but “the privilege of proceeding *in forma pauperis* in civil
 4 actions for damages should be sparingly granted.” *Weller v. Dickson*, 314 F.2d 598, 600 (9th Cir.
 5 1963), *cert. denied* 375 U.S. 845 (1963). Moreover, a court should “deny leave to proceed *in*
 6 *forma pauperis* at the outset if it appears from the face of the proposed complaint that the action
 7 is frivolous or without merit.” *Tripathi v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1369 (9th Cir.
 8 1987) (citations omitted); *see also* 28 U.S.C. § 1915(e)(2)(B)(i). An *in forma pauperis* complaint
 9 is frivolous if “it ha[s] no arguable substance in law or fact.” *Id.* (citing *Rizzo v. Dawson*, 778
 10 F.2d 527, 529 (9th Cir. 1985); *see also* *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984).

11 A *pro se* Plaintiff’s complaint is to be construed liberally, but like any other complaint it
 12 must nevertheless contain factual assertions sufficient to support a facially plausible claim for
 13 relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell*
 14 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A
 15 claim for relief is facially plausible when “the plaintiff pleads factual content that allows the
 16 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
 17 *Iqbal*, 556 U.S. at 678.

18 Peck continues to claim that Kitsap County Prosecutor Tunheim is violating his rights by
 19 interfering with his ability to communicate with and generally parent his child. Peck denies that
 20 this claim is based on the fact of his own incarceration, and that he blames Tunheim for that
 21 incarceration. He denies that he is appealing or seeking revision of any state court decision.

22 Instead, he claims that whenever he sets a hearing in state court—seeking “an opportunity
 23 to be heard in an effort to have companionship with his child”—Tunheim comes to court and
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1 asks the court to strike the hearing based on Peck's failure to appear. He has submitted what
2 appear to be docket entries from the superior court, and while it is hard to interpret, it does
3 appear that some hearings were stricken for "non-appearance." But it seems obvious that Peck
4 did not in fact appear at the hearing. It is unclear what Peck thinks the opposing attorney, or the
5 court, should have done instead, when the moving party is not present. Tunheim's name does not
6 appear on the docket, and it is not clear what the hearing(s) were supposed to address, or why a
7 hearing was required in the first place.

8 In the absence of some order prohibiting it, Peck is free to communicate with his child,
9 and to the child's companionship, subject, of course, to the fact that Peck is in prison. Peck
10 denies that it is this particular impediment that is the subject of his suit, but he has not pled a
11 plausible claim that the impediment is instead something that Tunheim personally did to deprive
12 Peck of his parental rights¹. And alleging (or even proving) that the state court struck hearings
13 scheduled by Peck because Peck did not appear at them is not plausibly a violation of Peck's
14 constitutional rights, and certainly not a violation caused by Tunheim.

15 The petition for leave to proceed *in forma pauperis* is therefore **DENIED**. Because this is
16 the third attempt at stating a claim, the matter is **DISMISSED** without prejudice.

17 IT IS SO ORDERED.

18 Dated this 9th day of March, 2017.

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23 Ronald B. Leighton
24 United States District Judge

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27 ¹ If there is a state court order prohibiting contact, then Peck's claim here does appear to
28 be a de facto appeal of that order, and this court cannot address it.